

ASSEMBLY BILL

No. 353

Introduced by Assembly Member Voepel

(Coauthors: Assembly Members Chávez, Harper, Mathis, ~~and Waldron~~ Waldron, Acosta, Brough, Cunningham, Mayes, Patterson, and Reyes)

(Coauthors: Senators Anderson, Bates, Berryhill, Nguyen, ~~and Nielsen~~ Nielsen, Vidak, and Wilk)

February 8, 2017

An act to amend Section 12940 of, and to add Article 3 (commencing with Section 12958) to Chapter 6 of Part 2.8 of Division 3 of Title 2 of, the Government Code, relating to employment.

LEGISLATIVE COUNSEL'S DIGEST

AB 353, as introduced, Voepel. Veterans' preferences: voluntary policy.

Under the California Fair Employment and Housing Act, it is an unlawful employment practice for an employer, unless based upon a bona fide occupational qualification or applicable security regulations established by the United States or the State of California, to refuse to hire or employ a person or to refuse to select a person for a training program leading to employment, or to bar or discharge a person from employment or a training program leading to employment, or to discriminate against a person in compensation or in terms, conditions, or privileges of employment because of the race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, genetic information, marital status, sex, gender, gender identity, gender expression, age, sexual orientation, or military and veteran status of that person. The California Fair Employment and

Housing Act provides that nothing in that act relating to discrimination on account of sex affects the right of an employer to use veteran status as a factor in employee selection or to give special consideration to Vietnam-era veterans.

This bill would enact the Voluntary Veterans' Preference Employment Policy Act to authorize a private employer to establish and maintain a written veterans' preference employment policy, to be applied uniformly to hiring decisions, to give a voluntary preference for hiring or retaining a veteran over another qualified applicant or employee. The bill would provide that the granting of a veterans' preference pursuant to the bill, in and of itself, shall be deemed not to violate any local or state equal employment opportunity law or regulation, including, but not limited to, the antidiscrimination provisions of the California Fair Employment and Housing Act. The bill would revise the existing veteran status provision in the California Fair Employment and Housing Act to remove references to discrimination on account of sex and to Vietnam-era veterans, and would, instead, provide that nothing in that act relating to discrimination affects the right of an employer to use veteran status as a factor in hiring decisions if the employer maintains a veterans' preference employment policy established in accordance with the Voluntary Veterans' Preference Employment Policy Act. The bill would prohibit a veterans' preference employment policy from being established or applied for the purpose of discriminating against an employment applicant on the basis of a protected classification, as specified.

Vote: majority. Appropriation: no. Fiscal committee: yes.
State-mandated local program: no.

The people of the State of California do enact as follows:

- 1 SECTION 1. Section 12940 of the Government Code is
- 2 amended to read:
- 3 12940. It is an unlawful employment practice, unless based
- 4 upon a bona fide occupational qualification, or, except where based
- 5 upon applicable security regulations established by the United
- 6 States or the State of California:
- 7 (a) For an employer, because of the race, religious creed, color,
- 8 national origin, ancestry, physical disability, mental disability,
- 9 medical condition, genetic information, marital status, sex, gender,
- 10 gender identity, gender expression, age, sexual orientation, or

1 military and veteran status of any person, to refuse to hire or
2 employ the person or to refuse to select the person for a training
3 program leading to employment, or to bar or to discharge the
4 person from employment or from a training program leading to
5 employment, or to discriminate against the person in compensation
6 or in terms, conditions, or privileges of employment.

7 (1) This part does not prohibit an employer from refusing to
8 hire or discharging an employee with a physical or mental
9 disability, or subject an employer to any legal liability resulting
10 from the refusal to employ or the discharge of an employee with
11 a physical or mental disability, where the employee, because of
12 his or her physical or mental disability, is unable to perform his
13 or her essential duties even with reasonable accommodations, or
14 cannot perform those duties in a manner that would not endanger
15 his or her health or safety or the health or safety of others even
16 with reasonable accommodations.

17 (2) This part does not prohibit an employer from refusing to
18 hire or discharging an employee who, because of the employee's
19 medical condition, is unable to perform his or her essential duties
20 even with reasonable accommodations, or cannot perform those
21 duties in a manner that would not endanger the employee's health
22 or safety or the health or safety of others even with reasonable
23 accommodations. Nothing in this part shall subject an employer
24 to any legal liability resulting from the refusal to employ or the
25 discharge of an employee who, because of the employee's medical
26 condition, is unable to perform his or her essential duties, or cannot
27 perform those duties in a manner that would not endanger the
28 employee's health or safety or the health or safety of others even
29 with reasonable accommodations.

30 (3) Nothing in this part relating to discrimination on account of
31 marital status shall do either of the following:

32 (A) Affect the right of an employer to reasonably regulate, for
33 reasons of supervision, safety, security, or morale, the working of
34 spouses in the same department, division, or facility, consistent
35 with the rules and regulations adopted by the commission.

36 (B) Prohibit bona fide health plans from providing additional
37 or greater benefits to employees with dependents than to those
38 employees without or with fewer dependents.

39 (4) Nothing in this part relating to discrimination ~~on account of~~
40 ~~sex~~ shall affect the right of an employer to use veteran status as a

1 factor in ~~employee selection~~ hiring decisions if the employer
2 maintains a veterans' preference employment policy established
3 in accordance with Article 3 (commencing with Section 12958).
4 A veterans' preference employment policy shall not be established
5 or to give special consideration to Vietnam-era veterans. applied
6 for the purpose of discriminating against an employment applicant
7 on the basis of any protected classification in this subdivision.

8 (5) (A) This part does not prohibit an employer from refusing
9 to employ an individual because of his or her age if the law
10 compels or provides for that refusal. Promotions within the existing
11 staff, hiring or promotion on the basis of experience and training,
12 rehiring on the basis of seniority and prior service with the
13 employer, or hiring under an established recruiting program from
14 high schools, colleges, universities, or trade schools do not, in and
15 of themselves, constitute unlawful employment practices.

16 (B) The provisions of this part relating to discrimination on the
17 basis of age do not prohibit an employer from providing health
18 benefits or health care reimbursement plans to retired persons that
19 are altered, reduced, or eliminated when the person becomes
20 eligible for Medicare health benefits. This subparagraph applies
21 to all retiree health benefit plans and contractual provisions or
22 practices concerning retiree health benefits and health care
23 reimbursement plans in effect on or after January 1, 2011.

24 (b) For a labor organization, because of the race, religious creed,
25 color, national origin, ancestry, physical disability, mental
26 disability, medical condition, genetic information, marital status,
27 sex, gender, gender identity, gender expression, age, sexual
28 orientation, or military and veteran status of any person, to exclude,
29 expel, or restrict from its membership the person, or to provide
30 only second-class or segregated membership or to discriminate
31 against any person because of the race, religious creed, color,
32 national origin, ancestry, physical disability, mental disability,
33 medical condition, genetic information, marital status, sex, gender,
34 gender identity, gender expression, age, sexual orientation, or
35 military and veteran status of the person in the election of officers
36 of the labor organization or in the selection of the labor
37 organization's staff or to discriminate in any way against any of
38 its ~~members or against members, any employer employer, or against~~
39 any person employed by an employer.

1 (c) For any person to discriminate against any person in the
2 selection, termination, training, or other terms or treatment of that
3 person in any apprenticeship training program, any other training
4 program leading to employment, an unpaid internship, or another
5 limited duration program to provide unpaid work experience for
6 that person because of the race, religious creed, color, national
7 origin, ancestry, physical disability, mental disability, medical
8 condition, genetic information, marital status, sex, gender, gender
9 identity, gender expression, age, sexual orientation, or military
10 and veteran status of the person discriminated against.

11 (d) For any employer or employment agency to print or circulate
12 or cause to be printed or circulated any publication, or to make
13 any nonjob-related inquiry of an employee or applicant, either
14 verbal or through use of an application form, that expresses,
15 directly or indirectly, any limitation, specification, or discrimination
16 as to race, religious creed, color, national origin, ancestry, physical
17 disability, mental disability, medical condition, genetic information,
18 marital status, sex, gender, gender identity, gender expression,
19 age, sexual orientation, or military and veteran status, or any intent
20 to make any such limitation, specification, or discrimination. This
21 part does not prohibit an employer or employment agency from
22 inquiring into the age of an ~~applicant~~, *applicant* or from specifying
23 age limitations, where the law compels or provides for that action.

24 (e) (1) Except as provided in paragraph (2) or (3), for any
25 employer or employment agency to require any medical or
26 psychological examination of an applicant, to make any medical
27 or psychological inquiry of an applicant, to make any inquiry
28 whether an applicant has a mental ~~disability~~ or *disability*, physical
29 ~~disability~~ *disability*, or medical condition, or to make any inquiry
30 regarding the nature or severity of a physical disability, mental
31 disability, or medical condition.

32 (2) Notwithstanding paragraph (1), an employer or employment
33 agency may inquire into the ability of an applicant to perform
34 job-related functions and may respond to an applicant's request
35 for reasonable accommodation.

36 (3) Notwithstanding paragraph (1), an employer or employment
37 agency may require a medical or psychological examination or
38 make a medical or psychological inquiry of a job applicant after
39 an employment offer has been made but prior to the
40 commencement of employment duties, provided that the

1 examination or inquiry is job related and consistent with business
2 necessity and that all entering employees in the same job
3 classification are subject to the same examination or inquiry.

4 (f) (1) Except as provided in paragraph (2), for any employer
5 or employment agency to require any medical or psychological
6 examination of an employee, to make any medical or psychological
7 inquiry of an employee, to make any inquiry whether an employee
8 has a mental disability, physical disability, or medical condition,
9 or to make any inquiry regarding the nature or severity of a physical
10 disability, mental disability, or medical condition.

11 (2) Notwithstanding paragraph (1), an employer or employment
12 agency may require any examinations or inquiries that ~~it~~ *the*
13 ~~employer or employment agency~~ can show to be job related and
14 consistent with business necessity. An employer or employment
15 agency may conduct voluntary medical examinations, including
16 voluntary medical ~~histories~~, ~~which~~ *histories that* are part of an
17 employee health program available to employees at that worksite.

18 (g) For any employer, labor organization, or employment agency
19 to harass, discharge, expel, or otherwise discriminate against any
20 person because the person has made a report pursuant to Section
21 11161.8 of the Penal ~~Code that~~ *Code, which* prohibits retaliation
22 against hospital employees who report suspected patient abuse by
23 health facilities or community care facilities.

24 (h) For any employer, labor organization, employment agency,
25 or person to discharge, expel, or otherwise discriminate against
26 any person because the person has opposed any practices forbidden
27 under this part or because the person has filed a complaint, testified,
28 or assisted in any proceeding under this part.

29 (i) For any person to aid, abet, incite, compel, or coerce the
30 doing of any of the acts forbidden under this part, or to attempt to
31 do so.

32 (j) (1) For an employer, labor organization, employment agency,
33 apprenticeship training ~~program~~ *program*, or any training program
34 leading to employment, or any other person, because of race,
35 religious creed, color, national origin, ancestry, physical disability,
36 mental disability, medical condition, genetic information, marital
37 status, sex, gender, gender identity, gender expression, age, sexual
38 orientation, or military and veteran status, to harass an employee,
39 an applicant, an unpaid intern or volunteer, or a person providing
40 services pursuant to a contract. Harassment of an employee, an

1 applicant, an unpaid intern or volunteer, or a person providing
2 services pursuant to a contract by an employee, other than an agent
3 or supervisor, shall be unlawful if the entity, or its agents or
4 supervisors, knows or should have known of this conduct and fails
5 to take immediate and appropriate corrective action. An employer
6 may also be responsible for the acts of nonemployees, with respect
7 to sexual harassment of employees, applicants, unpaid interns or
8 volunteers, or persons providing services pursuant to a contract in
9 the workplace, where the employer, or its agents or supervisors,
10 knows or should have known of the conduct and fails to take
11 immediate and appropriate corrective action. In reviewing cases
12 involving the acts of nonemployees, the extent of the employer's
13 control and any other legal responsibility that the employer may
14 have with respect to the conduct of those nonemployees shall be
15 considered. An entity shall take all reasonable steps to prevent
16 harassment from occurring. Loss of tangible job benefits shall not
17 be necessary in order to establish harassment.

18 (2) ~~The provisions of this~~ *This subdivision* ~~are~~ *is* declaratory
19 of existing law, except for the new duties imposed on employers
20 with regard to harassment.

21 (3) An employee of an entity subject to this subdivision is
22 personally liable for any harassment prohibited by this section that
23 is perpetrated by the employee, regardless of whether the employer
24 or covered entity knows or should have known of the conduct and
25 fails to take immediate and appropriate corrective action.

26 (4) (A) For purposes of this subdivision only, "employer" means
27 any person regularly employing one or more persons or regularly
28 receiving the services of one or more persons providing services
29 pursuant to a contract, or any person acting as an agent of an
30 employer, directly or indirectly, the state, or any political or civil
31 subdivision of the state, and cities. The definition of "employer"
32 in subdivision (d) of Section 12926 applies to all provisions of this
33 section other than this subdivision.

34 (B) Notwithstanding subparagraph (A), for purposes of this
35 subdivision, "employer" does not include a religious association
36 or corporation not organized for private profit, except as provided
37 in Section 12926.2.

38 (C) For purposes of this subdivision, "harassment" because of
39 sex includes sexual harassment, gender harassment, and harassment

1 based on pregnancy, childbirth, or related medical conditions.
2 Sexually harassing conduct need not be motivated by sexual desire.

3 (5) For purposes of this subdivision, “a person providing services
4 pursuant to a contract” means a person who meets all of the
5 following criteria:

6 (A) The person has the right to control the performance of the
7 contract for services and discretion as to the manner of
8 performance.

9 (B) The person is customarily engaged in an independently
10 established business.

11 (C) The person has control over the time and place the work is
12 performed, supplies the tools and instruments used in the work,
13 and performs work that requires a particular skill not ordinarily
14 used in the course of the employer’s work.

15 (k) For an employer, labor organization, employment agency,
16 apprenticeship training program, or any training program leading
17 to employment, to fail to take all reasonable steps necessary to
18 prevent discrimination and harassment from occurring.

19 (l) (1) For an employer or other entity covered by this part to
20 refuse to hire or employ a person or to refuse to select a person
21 for a training program leading to employment or to bar or to
22 discharge a person from employment or from a training program
23 leading to employment, or to discriminate against a person in
24 compensation or in terms, conditions, or privileges of employment
25 because of a conflict between the person’s religious belief or
26 observance and any employment requirement, unless the employer
27 or other entity covered by this part demonstrates that it has explored
28 any available reasonable alternative means of accommodating the
29 religious belief or observance, including the possibilities of
30 excusing the person from those duties that conflict with his or her
31 religious belief or observance or permitting those duties to be
32 performed at another time or by another person, but is unable to
33 reasonably accommodate the religious belief or observance without
34 undue hardship, as defined in subdivision (u) of Section 12926,
35 on the conduct of the business of the employer or other entity
36 covered by this part. Religious belief or observance, as used in
37 this section, includes, but is not limited to, observance of a Sabbath
38 or other religious holy day or days, reasonable time necessary for
39 travel prior and subsequent to a religious observance, and religious
40 dress practice and religious grooming practice as described in

1 subdivision (q) of Section 12926. This subdivision shall also apply
2 to an apprenticeship training program, an unpaid internship, and
3 any other program to provide unpaid experience for a person in
4 the workplace or industry.

5 (2) An accommodation of an individual's religious dress practice
6 or religious grooming practice is not reasonable if the
7 accommodation requires segregation of the individual from other
8 employees or the public.

9 (3) An accommodation is not required under this subdivision
10 if it would result in a violation of this part or any other law
11 prohibiting discrimination or protecting civil rights, including
12 subdivision (b) of Section 51 of the Civil Code and Section 11135
13 of this code.

14 (4) For an employer or other entity covered by this part to, in
15 addition to the employee protections provided pursuant to
16 subdivision (h), retaliate or otherwise discriminate against a person
17 for requesting accommodation under this subdivision, regardless
18 of whether the request was granted.

19 (m) (1) For an employer or other entity covered by this part to
20 fail to make reasonable accommodation for the known physical
21 or mental disability of an applicant or employee. Nothing in this
22 subdivision or in paragraph (1) or (2) of subdivision (a) shall be
23 construed to require an accommodation that is demonstrated by
24 the employer or other covered entity to produce undue hardship,
25 as defined in subdivision (u) of Section 12926, to its operation.

26 (2) For an employer or other entity covered by this part to, in
27 addition to the employee protections provided pursuant to
28 subdivision (h), retaliate or otherwise discriminate against a person
29 for requesting accommodation under this subdivision, regardless
30 of whether the request was granted.

31 (n) For an employer or other entity covered by this part to fail
32 to engage in a timely, good faith, interactive process with the
33 employee or applicant to determine effective reasonable
34 accommodations, if any, in response to a request for reasonable
35 accommodation by an employee or applicant with a known physical
36 or mental disability or known medical condition.

37 (o) For an employer or other entity covered by this part, to
38 subject, directly or indirectly, any employee, applicant, or other
39 person to a test for the presence of a genetic characteristic.

(p) Nothing in this section shall be interpreted as preventing the ability of employers to identify members of the military or veterans for purposes of awarding a veteran's preference as permitted by law.

SEC. 2. Article 3 (commencing with Section 12958) is added to Chapter 6 of Part 2.8 of Division 3 of Title 2 of the Government Code, to read:

Article 3. Voluntary Veterans' Preference Employment Policies

12958. This article shall be known, and may be cited, as the "Voluntary Veterans' Preference Employment Policy Act."

12958.1. As used in this article:

(a) "DD 214" means United States Department of Defense Form 214 or a similarly effective form issued by that department relating to separation from military service.

(b) "Private employer" means a business entity in the private sector of this state with one or more employees.

(c) "Veteran" means a person who served on active duty in the Armed Forces of the United States who was discharged or released with an honorable discharge.

(d) "Veterans' preference employment policy" means a private employer's voluntary preference for hiring or retaining a veteran over another qualified applicant or employee.

12958.2. (a) Notwithstanding any other law, a private employer may establish and maintain a written veterans' preference employment policy, which shall be applied uniformly to hiring decisions.

(b) An employer with a veterans' preference employment policy may require that a veteran submit a DD 214 to be eligible for the preference.

(c) The granting of a veterans' preference pursuant to this article, in and of itself, shall be deemed not to violate any local or state equal employment opportunity law or regulation, including, but not limited to, this chapter.

(d) The Department of Veterans Affairs shall assist any private employer in determining if an applicant is a veteran to the extent permitted by law.

(e) Nothing in this section shall be construed to authorize the establishment or use of a veterans' preference employment policy

1 for the purpose of discriminating against an employment applicant
2 on the basis of any protected classification in subdivision (a) of
3 Section 12940.

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6 **REVISIONS:**

7 **Heading—Lines 2, 3, and 4.**

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